

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2488-CR

Cir. Ct. No. 2013CF604

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES M. CLARK, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. A jury convicted James Clark, Sr. of second-degree sexual assault of a child. The circuit court denied Clark's postconviction motion seeking a new trial due to ineffective assistance of trial counsel. The

circuit court concluded that trial counsel's performance was neither deficient nor prejudicial. We affirm.

¶2 Clark's ineffective assistance of trial counsel claims criticized the manner in which counsel impeached the victim with inconsistencies in her statements about the assault and demonstrated to the jury the victim's general lack of credibility.¹ Trial counsel and Clark testified at the evidentiary hearing on Clark's postconviction motion seeking a new trial. The circuit court denied Clark's motion after finding that counsel's actions were part of a trial strategy designed to undermine the victim's credibility without alienating the jury.

¶3 A defendant who claims that trial counsel was ineffective must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense. *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. If we conclude that counsel did not perform deficiently, we need not reach the prejudice analysis. *State v. Williams*, 2006 WI App 212, ¶¶18-19, 296 Wis. 2d 834, 723 N.W.2d 719. We will affirm the circuit court's factual findings unless they are clearly erroneous. *State v. Kimbrough*, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752 (citations omitted). However, we review deficient performance and prejudice independently because they present questions of law. *Id.*

¹ A number of these ineffective assistance allegations are abandoned on appeal. We only review that which Clark argues on appeal.

¶4 Two significant circuit court findings shape our analysis of Clark’s ineffective assistance claims. First, the circuit court found that trial counsel had a strategy for undermining the victim’s credibility. Second, the court made credibility determinations at the postconviction motion hearing: trial counsel was credible and Clark was not. We are bound by the court’s credibility findings. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (The circuit court “is the ultimate arbiter of the credibility of the witnesses and the weight given to each witness’s testimony.”). Because these findings are not clearly erroneous and are binding on us, we decline to address Clark’s ineffective assistance claims piecemeal.²

¶5 After taking evidence at the postconviction motion hearing, the circuit court found that trial counsel had a strategy for impeaching the victim via cross-examination and via the testimony of her family members whom counsel expected to and did undermine the victim’s credibility. The court found that trial counsel was experienced and kept many notes, which she consulted often during the trial. The court reviewed its own notes from the trial and found that trial counsel was competent and persuasive and argued Clark’s case well. Counsel’s cross-examination elicited the weaknesses in the State’s case, counsel elicited admissions from the victim that were not favorable to the State’s case, and counsel impeached the victim and used the impeachment evidence throughout the trial.

¶6 As part of her trial strategy to impeach the victim’s credibility, Clark’s counsel relied upon the testimony of the victim’s father and mother. The

² We are not required to address the issues in the manner in which a party has framed them. See *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). The specific claims are set out in footnote four.

victim's father testified that the victim received consistent and ongoing counseling to address troubling and concerning behaviors and that it was common knowledge that the victim often lied and stole property. The circuit court characterized the father's testimony as "devastating" to the victim. The victim's mother testified during the State's case that the victim had been in trouble and under supervision, had stolen property, and had been in therapy for lying and stealing. On cross-examination, the mother elaborated that the victim's problems were significant. The victim's mother characterized the victim's credibility as limited. Clark testified at the postconviction motion hearing that of all of the victim's family members, the victim's father spent the most time with the victim and was in the best position to testify about her credibility.

¶7 In addition to using the father's and mother's testimony to counter the State's case and the victim's credibility, Clark's counsel had a strategy of cross-examining the victim. Counsel's strategy was informed by her view that attacking and aggressively demeaning the victim before the jury would not yield a desirable result and could cause the jury to turn against the defense for that very approach alone. Counsel's strategy was designed "to get as many admissions out of the victim as [she] could" using a "friendly and conversational manner as opposed to attacking" or using a "more aggressive" demeanor because "juries don't take kindly to the fact of bullying witnesses and certainly not ... juvenile witnesses."³ On cross-examination, the victim admitted that she stole from and had conflict with family members. The circuit court found that counsel reasonably decided not to explore every possible inconsistency in the victim's description of the assault or in

³ The child was sixteen when she was assaulted and seventeen when she testified at Clark's trial.

her post-assault conduct which Clark believed was inconsistent with the behavior to be expected from a sexual assault victim. The court found that trial counsel used the information available to impeach the victim or otherwise undermine her credibility (including her alleged history of stealing, lying, and sex-related conduct).

¶8 In her closing argument, Clark’s counsel argued that the victim had a motive to fabricate the assault in part because of her various conflicts with family members.

¶9 The circuit court found that trial counsel impeached the victim’s credibility via cross-examination and through her parents. As a result, the jury had before it numerous challenges to the victim’s credibility. The court found that any other witnesses, including family members, who might have shed light on the victim’s credibility would have been duplicative and would not have changed the trial’s result. The court found that counsel made a reasonable strategic decision to rely upon the victim’s father’s testimony, which was the most powerful testimony the defense could have offered to undermine the victim’s credibility.

¶10 The circuit court’s findings of fact regarding trial counsel’s conduct and trial strategy are not clearly erroneous. See *Kimbrough*, 246 Wis. 2d 648, ¶27. Decisions about calling witnesses are within the ambit of trial counsel’s independent professional judgment. *Whitmore v. State*, 56 Wis. 2d 706, 715, 203 N.W.2d 56 (1973). We will not “second-guess a trial attorney’s ‘considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.’ A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective

assistance of counsel.” *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted).

¶11 On appeal, Clark acknowledges that his trial counsel impeached the victim’s credibility. However, he criticizes counsel for not exploring and exploiting every inconsistency in the victim’s version of events⁴ or suggesting that sexual assault victims do not behave as the victim behaved (in Clark’s view, the victim continuing to interact in a “normal” way with Clark after the assault). As we have stated, trial counsel’s strategy for cross-examining the victim was designed not to alienate the jury, and the circuit court found that this strategy was a reasonable choice. We agree that Clark did not meet his burden to show that counsel’s performance was deficient.

¶12 Clark next argues that trial counsel should have undertaken additional inquiries at trial as discussed in footnote four of this opinion. As previously stated, we will not review these challenges piecemeal. As a result of trial counsel’s strategy to use the most effective witnesses to challenge the victim’s credibility and to employ a considered, measured approach to the victim, the jury had a sufficient basis to question the victim’s credibility. The additional information Clark argues should have been put before the jury, to the extent such evidence would have been

⁴ Clark complains that his trial counsel did not explore and exploit: the basis for the victim’s fear of Clark, Clark did not threaten the victim, the victim never told Clark to stop touching her sexually, questions about the order in which Clark touched the victim’s intimate body parts, the unlikely presence, out in the open for Clark to see, of KY lubricant in the victim’s father’s bedroom, inconsistent statements regarding the role KY lubricant played in the assault, the victim’s decision to spend recreational time with Clark after the assault, inconsistent statements about which hand Clark used in the sexual assault, an officer’s suggestion that the victim’s description of the assault was unlikely, the victim statement that she stopped the assault by reminding Clark that his wife was in jail and that assaulting her would be cheating on his wife, the absence of alcohol, and questions about masturbation.

admissible, would have only incrementally challenged the victim's credibility and risked alienating the jury. Such evidence would not have been sufficient to establish a reasonable probability that the jury would have reached a different verdict, the showing required to establish the prejudice prong of the ineffective assistance analysis. *See State v. Tkacz*, 2002 WI App 281, ¶¶19-22, 258 Wis. 2d 611, 654 N.W.2d 37.

¶13 Counsel's trial strategy was designed to impeach the victim's credibility without alienating the jury. Counsel made a reasonable strategic decision in light of all of the facts and the law. *Elm*, 201 Wis. 2d at 464-65. We conclude that counsel did not perform deficiently.

¶14 We affirm the judgment of conviction and the circuit court's order denying Clark's motion seeking a new trial due to ineffective assistance of trial counsel.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited except as provided under RULE 809.23(3) (2015-16).

